The policy of our government is at present expressed inconsistently as well as incoherently.[18] And that business in general desires the lawfulness of such contracts as these seems doubtful in the extreme.

IS LEGISLATIVE ABOLITION OF THE INJUNCTIVE REMEDY IN LABOR DISPUTES UNCONSTITUTIONAL? — A recent Massachusetts case is a curious commentary on the practical effects of the Newtonian theory of gravitation as applied to government. The defendants, members of a trade union desirous of forcing the plaintiffs, members of a rival organization, to join their number, brought pressure on the latter's employers to compel them to discharge the plaintiffs. A statute provided that no injunction should be granted in any case between employers and employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, and that for this purpose the right to enter into the relation of employer and employee should not be a property right.[1] Disregarding this statute as violative of the Fourteenth Amendment of the Constitution of the United States the court granted the plaintiff's prayer for an injunction. *Bogni* v. *Perotti*, 203 Mass. 26, 112 N. E. 853.

In the first place not much sympathy can be expressed with the technique of the legislation here in question. It involves two assumptions of a highly questionable character: first, that equity will interfere only when the right threatened is a right of property; second, that what was property can cease to be so by legislative fiat. The suggestion of an intent to outflank the Fourteenth Amendment is not a good character for an act to carry on its face. "No statute is a good risk which invites cautious judges to hamstring it."[2] The plain purpose of the act, however, and the result in fact of all its language is to prevent the use of injunctions in labor difficulties where no violence or injury to tangible property is threatened. The court by its decision must deny the validity of this purpose and result as well as the assumptions of the accompanying language.

The court argues that the right to dispose of one's labor free from the sort of interference here practiced is a property right which the legislature cannot despoil by removing it from the scope of the only effective remedy provided by the law for the specific protection of property. Such action, the court asserts, is to discriminate between this right and

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[18] For a lucid enumeration of the five economic policies open to us, see Henry R. Seager, "The New Anti-trust Acts," 30 POL. SCI. Q. 448. The first — *laissez faire* — can be of only academic interest now. The others are, in order, enforced competition, (which the first interpretation of the Sherman law expressed), regulated competition (the Sherman law at present), regulated combination, and government ownership. The Clayton law is apparently based upon a jumbling of the second and the third of these policies.

For a statement of the economic policy back of the Sherman law, see M. S. Hottesheim, "The Sherman Anti-trust Law," 44 AM. L. REV. 827, 852. *Cf.* B. A. Ross, "Freedom of Trade," *supra*, at 240.

[1] MASS. ACTS 1914, c. 778.

[2] John M. Maguire, "State Liability for Tort," *supra*, p. 36.

other rights of property and to deprive it of equal protection of the laws.

An indispensable preliminary to a solution of this constitutional problem is to visualize a bit of judicial history. When the courts were presented with the question of the legality of labor unions and the methods these organizations might employ to gain their ends, they based their decisions, more or less consciously, upon considerations of social policy.[3] In deciding on the legality of such actions as pursued by the defendants in the principal case, courts have reached different conclusions.[4] The Massachusetts Supreme Court, Mr. Justice Holmes dissenting, pronounced against the legality of the conscription of neutrals.[5] This decision on what is essentially a question of social policy the Massachusetts legislature has attempted to reverse by the statute presented in the principal case, but now the court says that the Constitution of the United States forbids any impairment of this recognized property right by elimination of remedies. It must be stated frankly that the court is using the Constitution to impose its views of social policy on the state.[6] Those state courts that recognized the conscription of neutrals equally decided a question of social policy, but as this view coincided with the legislative, no clash occurred on the battlefield of constitutional law.[7]

But even though this survey shows that we are dealing with a conflict between the social and economic views of two coördinate branches of the government over a problem intrinsically legislative, it is perhaps better to admit that the freedom to contract with regard to labor unrestrained by secondary labor boycotts is now, in view of past decisions, a right of property. Then arises the question whether the legislature had the right to discriminate between this and other forms of property in regard to injunctive remedies.[8] Not only is there a discrimination relative to other

[3] See the great opinion by Shaw, C. J., in Commonwealth *v.* Hunt, 4 Met. (Mass.) 111; also the dissent of Holmes, J., in Vegelahn *v.* Guntner, 167 Mass. 92, 104, 44 N. E. 1077, 1079. In Plant *v.* Woods, 176 Mass. 492, 502, 57 N. E. 1011, 1015, the court said: "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and are therefore malicious and unlawful."

[4] These cases have recognized acts as lawful. National Protective Ass'n of Steam Fitters and Helpers *v.* Cumming, 170 N. Y. 315, 63 N. E. 369. Lindsay & Co. *v.* Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127. Parkinson Co. *v.* Building Trades Council, 154 Cal. 581, 98 Pac. 1027. *Contra:* Brennan *v.* United Hatters of No. Am., 73 N. J. Law 729, 65 Atl. 165. Erdman *v.* Mitchell, 207 Pa. St. 79, 56 Atl. 327.

[5] Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011. In his dissenting opinion Mr. Justice Holmes dwells on the nature of the problem involved and the proper mode of approach to a solution.

[6] The question involved in this case was presented by another Massachusetts case recently decided. Commonwealth *v.* Boston & Me. R., 222 Mass. 206, 110 N. E. 264. See the suggestive article of Professor Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353–372.

[7] This situation rouses interesting speculation. Suppose that the legislature should declare illegal the compound labor boycott legalized by the courts. It cannot reasonably be imagined that this statute could be attacked as unconstitutional, yet it presents the converse of the principal case. Here the question of property rights cannot be put forward to obscure the legislative nature of the problem.

[8] For treatment of this and similar constitutional questions along the proper line of approach, see: Muller *v.* Oregon, 208 U. S. 412; Ritchie & Co. *v.* Wayman, 244 Ill.

species of property, but also to freedom of contract in other than labor situations. The court should not declare unconstitutional this distinction between remedies for different classes of property, unless the classification is clearly arbitrary or unreasonable.[9] Whether this can be said in the case of the legislation now in question need not be finally decided here. It is sufficient to point out that a decision cannot be reached by trying to piece statute and Constitution together like a jig saw puzzle.[10] There is necessary a thoroughgoing study and appreciation of the facts, as well as of the policy sought to be enforced by the legislative act in question.[11] Only if after such investigation the court is still convinced that the classification is without reasonable basis should it declare the action of the legislature void. The unfortunate method of the statute, and perhaps insufficient pressing in argument of the social data, are undoubtedly responsible for the unsatisfying character of the decision that was rendered.

CONSTITUTIONALITY OF A TAX ON INCOME DERIVED FROM EXPORTS. — A recent case raises the question whether there are not certain sources of income, other than those specifically enumerated in the Federal Income Tax Law of 1913,[1] which are exempt from taxation. A corporation, whose business consisted largely in exportation, sought to recover such proportion of the corporate income tax as was paid on their export trade. They contended that it was an unconstitutional export tax,[2] but it was *held* that they might not recover. *Peck & Co.* v. *Lowe*, 55 N. Y. L. J. 981 (U. S. Dist. Ct., S. Dist. N. Y.). It is certainly arguable that a tax on net incomes, derived to a large extent from exporting, is a tax on exports. The question is a new and very close one, and can be approached only by analogy and analysis. It is clear that a tax on the various instrumentalities used in exporting is unconstitutional.[3] An income tax, however, attaches to the proceeds after the actual act of exportation is completed, and so the "instrumentalities" cases are not conclusive in

509, 91 N. E. 695; Miller *v.* Wilson, 236 U. S. 373; People *v.* Schweinler Press, 214 N. Y. 395, 108 N. E. 639; and Mr. Justice Holmes' dissent in Adair *v.* United States, 208 U. S. 161, 190.

[9] Hadacheck *v.* Sebastian, 239 U. S. 394, 413; Price *v.* Illinois, 238 U. S. 446, 452.

[10] For expressions of the line of approach insisted on, see Dean Pound's article, "Liberty of Contract," 18 YALE L. J. 454; the paper by Professor Frankfurter referred to in note 6; the discussion in 28 HARV. L. REV. 790; and an article by Professor Ernst Freund, "Tendencies of Legislative Policy," 27 INTERNAT. J. ETH. 1, 23–24.

[11] There should have been called to the attention of the court for instance the English Trades Disputes Act, 1906, 6 EDW. 7, c. 47, § 3, and the debates that preceded its enactment; also the Australian solution of the problem. See Judge Higgins, "A New Field for Law and Order," 29 HARV. L. REV. 13. Further discussion of value may be found in Gregory, "Government by Injunction," 11 HARV. L. REV. 487; Dunbar, "Government by Injunction," 73 L. QUART. REV. 347; Allen, "Injunctions and Organized Labor," 28 AM. L. REV. 878; Dean, "Government by Injunction," 4 GREEN BAG 540; Stimson, "The Modern Use of Injunctions," 10 POL. SCI. QUART. 189.

[1] 38 STAT. AT L. 166, 172.

[2] U. S. CONST., Art. I, sec. 9.

[3] Fairbank *v.* U. S., 181 U. S. 283; U. S. *v.* Hvoslef, 237 U. S. 1; Thames, etc. Ins. Co. *v.* U. S., 237 U. S. 19. But see Goodwin, "U. S. *v.* Hvoslef," 29 HARV. L. REV. 469, where the doctrine of these cases is harshly criticised.